



STATE BOARD OF LAND COMMISSIONERS

Dirk Kempthorne, Governor and President of the Board
Pete T. Cenarrusa, Secretary of State
Alan G. Lance, Attorney General
J. D. Williams, State Controller
Marilyn Howard, Superintendent of Public Instruction

Stanley F. Hamilton, Secretary to the Board

FINAL MINUTES SPECIAL LAND BOARD MEETING July 6, 1999 1:30 PM

The special meeting of the Idaho State Board of Land Commissioners was held on July 6, 1999 in Boise, Idaho. The Honorable Governor Dirk Kempthorne presided. The following members were present:

Honorable Secretary of State Pete T. Cenarrusa
Honorable Attorney General Alan G. Lance
Honorable State Controller J. D. Williams
Honorable Superintendent of Public Instruction Marilyn Howard

Secretary to the Board Stanley F. Hamilton

• **REGULAR AGENDA**

1. Audience with the Board – John Faulkner

Director Hamilton informed the Board that Mr. Faulkner was present for an audience with the Board. He also introduced Mr. Norm Young, Deputy Director, Department of Water Resources and said Mr. Young was present for questions. Mr. Tracy Behrens, Range Management Specialist, presented background information.

Mr. Faulkner introduced his attorney, Mr. Gary Slatey. He said he had 137 AUMs south of Gooding. These were BLM AUMs that were exchanged to the state. He wanted to irrigate this land to raise the grazing capacity. At that time, he offered the Board 10 to 1 on the grazing fee. This was approved the second time around. He felt the reason it was approved was due to increasing the endowment funds.

Mr. Faulkner stated that he had an opportunity to get 320" of water. This was a permit on a 1973 right (Carey Act). The ground exchanged by BLM to the state was actually under Carey Act consideration at that time. The water would be a drilled well at Mr. Faulkner's expense. The water is needed to develop the rest of the ground into grass.

Mr. Tracy Behrens clarified some of Mr. Faulkner's remarks. He stated this is a parcel of land, approximately 880 acres, acquired by the state through an exchange with the BLM in the late 1980s. Mr. Faulkner obtained the lease on the land.

The arrangement Mr. Faulkner made with the Board in December 1993 was that he would continue a payment to the Department of ten times the current grazing rate for the 137 AUMs that were on the parcel. Mr. Faulkner would have that payment through the life of the lease, which ends in 2001. Because this is land acquired by the federal government, Mr. Faulkner has a guarantee for an automatic lease renewal and a second ten-year period. He agreed to a rental of seventeen times the AUM rate for the 137 AUMs on the parcel.

Through the agreement, Mr. Faulkner will be allowed to farm as many of the acres as feasible, based on water availability. There is a moratorium on well drilling and he is having difficulty finding water he can transfer to the state parcel.

Mr. Behrens said it was his understanding, based on the agreement the Board has with Mr. Faulkner, that Mr. Faulkner can farm as many acres as he can get water for and the rental will stay at what was agreed to, which is ten times the number of AUMs. Mr. Faulkner's long-term goal is to put in a crop for the first few years and then to convert that land to irrigated pastureland.

Mr. Young, Department of Water Resources, provided copies of the permit. He stated what was before his Department at this time was an application to amend the permit to change the place of use and the point of origin. One thing his Department will look at is whether or not the water right is valid. Mr. Young explained to the Board the application of amendment.

Attorney General Lance asked why the Board is involved in this if the Department of Water Resources is working on it. Mr. Gary Slatey, Mr. Faulkner's attorney, said the appearance before the Board is because the state is the owner of the land in question. This will become an asset to the state. Attorney General Lance said the Director of Water Resources has established the policy. He stated he felt it was not appropriate to try to strong arm another agency.

State Controller Williams asked Mr. Young to explain the public policy behind this request. Mr. Young explained the Carey Act provisions to the Land Board.

Governor Kempthorne asked Mr. Faulkner if the outcome allowed him to go ahead with this, would the improvements stay with the state. Mr. Faulkner stated that everything but the pump would be the property of the state.

Governor Kempthorne stated that he felt the decision should be made first by the Department of Water Resources.

Secretary of State Cenarrusa asked if we were going to forget the constitution to enhance the income of the school kids. Here we have an opportunity to do so. The Supreme Court recently told us about that. He stated that the Carey Act lands were granted some years ago. Mr. Young stated that nothing since 1920 has been done under the Carey Act.

Governor Kempthorne asked Director Hamilton in the event this water was made available to this state land is this a significant enhancement to the land. Director Hamilton stated it would be over dry grazing land.

Governor Kempthorne asked Mr. Faulkner if he had intended for the Board to make a decision at this time. Mr. Faulkner said this was information only but as a landowner, he would appreciate support from the Board.

There was no decision made regarding this issue.

2. Proposed lease at 590 West Washington with Health & Welfare, Emergency Medical Services – Staffed by Alvin Carr, Leasing Specialist

Director Hamilton introduced Alvin Carr. Mr. Carr provided background information.

This issue was before the Board at the April 13, 1999 meeting. Attorney General Lance stated if this was acceptable to all the Board members, he would move for the approval of the lease. State Controller Williams seconded the motion.

Governor Kempthorne asked if this would provide us with a model in future leases or will each of these types of leases with other departments be just as contentious. Mr. Carr said the lease provides the model for future leases. Each lease will still have to be looked at on its own merits.

Director Hamilton said the Department would like to enter into leases directly with the Department of Administration. He felt this would simplify the process even more in the future.

Pam Ahrens, Director of the Department of Administration, said there are a lot of issues to be resolved. She stated that the Department of Health and Welfare had been more than patient. She feels the departments are on good solid ground to move forward on future leases.

The motion carried on a vote of 5-0.

3. Scenic Bay Marina, Land Board policy on floathome rental – Presented by Bryce Taylor, Bureau Chief, Range Management/Surface Leasing

Mr. Bryce Taylor stated that the Land Board memorandum before the Board includes Scenic Bay Marina, but the department intends that this be a policy for all commercial marinas.

The Board had expressed concern that when marinas are established over public trust beds, those owners must maintain the marinas in a safe and sanitary condition. Also, that marinas should charge equitable moorage rental rates based on the local area they are serving. The Department has struggled with this issue in the past because they did not want to place the Board in a position of controlling rents between two private parties (the marina owners and the floathome owners).

The Department drafted a policy that sends a strong message to marina owners that they should charge rates based on the local market. Also drafted in the policy is a statement that marina owners must maintain the marinas in a safe and sanitary condition. The leases require or reserve to the state the right to require changes in the sanitation or other facilities of the marina for the protection of public health and safety.

Attorney General Lance was concerned about putting the Board in the position of being between marina owners and the lessees (floathome owners). State Controller Williams agreed with the Attorney General, except these marinas are not on private property. This is state land and people need to be treated fairly.

Governor Kempthorne asked Mr. Taylor if he felt this would be difficult to achieve. Mr. Taylor said it would be difficult to enforce by the Board but seeking judicial relief would help alleviate his concerns.

Mr. Taylor said if the Board adopts the policy, the Department would issue a lease to Scenic Bay Marina. The marina has resolved their safety and sanitation problems. They are trying to sell the marina. If they were to sell the marina, they need a lease to be able to move the property.

Attorney General Lance said he did not have the answers but could see problems. There should be some mechanism in the lease itself to assure the Board could enforce their own policies without dependence on the judicial branch of government. He questioned whether this could be written into the lease.

State Controller Williams stated that these people need some help. With several marinas on the lake, it should be easy to find an average rent. Mr. Taylor said Scenic Bay is higher than the others currently are and they want to go higher.

Governor Kempthorne stated if you let the marketplace work, it generally works well. He asked how mobile the floathomes are. Mr. Taylor stated that they are not mobile and very difficult to move.

Governor Kempthorne stated that he was sympathetic to the Attorney General Lance's concerns, but the Board needs to establish policy. Attorney General Lance stated that we need something in the master

lease with the marina owner. Mr. Taylor stated that the lease does not exist so the Board would have full latitude with this new lease to Scenic Bay.

Governor Kempthorne asked if the Department had looked at any other situations – such as with mobile homes. Mr. Taylor said the Department had not examined the mobile home residency act.

Superintendent Howard asked how much is owed to the state by the marina owner. Mr. Taylor said it is somewhere in the area of \$12,000.00 for base rent. That figure does not include the percentage owed on their boat moorage receipts.

State Controller Williams said if we were to adopt this policy it could be incorporated either specifically or by reference within the lease. We need to move ahead.

Governor Kempthorne asked Director Hamilton and Mr. Taylor if they were comfortable with the policy statement as written. Mr. Taylor suggested the Board could make the determination to settle the fair rent question. He believed the Board has always been able to reach what is a “fair” conclusion – what is fair market rent and what is fair to all sides.

Governor Kempthorne stated to the members of the Board that there was a policy and the Board could proceed with that policy, modify it or send it back to look at other models that may be on the books.

Attorney General Lance stated that this might be a two-step process. He said maybe the real implementation should be in the lease and it states “if the Land Board, by majority, determines that you are charging unreasonable rates – unreasonably high rates – in comparison with the local community appraised evaluation, etc., we have the right to terminate your lease.” He said this gave him some solace as to putting the authority back to the Land Board rather than just pushing it on to judiciary to figure out. There needs to be some mechanism to terminate the lease in the event there is a violation of what the Board considers to be “its policy.” He stated that he was not prepared to say this is a good start until he sees the language in the lease.

Governor Kempthorne asked the Attorney General how he would do this. Attorney General Lance stated he would start with what would be the value – not what was paid – but the value of the property with improvements as determined by assessment or appraisal. Then he would look at a fair rate of return for that facility. Secondly, if he were a floathome owner, he would like to be able to enter into a lease knowing that it is not going to be increased every six months. He felt this rate should be locked in for a period of time. He felt this would be the Land Board’s adaptation of the mobile home act along the lines that all could agree.

Governor Kempthorne asked if the Land Board takes the two points that have been raised, and this is the first step, should the Board proceed with this as step one? He asked how step two would be accomplished. Attorney General Lance stated that Department staff, legal counsel and Denny Davis would sit down and fashion the language that could be written into the master lease that would make sense and be fair to all concerned.

Director Hamilton said that item #2 of the recommendation asked the Land Board to proceed with the lease. This is clear direction that the Department would need to look at a term in that lease that would recognize the policy that the Land Board would adopt.

State Controller Williams moved to adopt the policy and that the Department staff work with legal counsel to incorporate the provisions with more precise language within the lease following the parameters as outlined by the Attorney General. Superintendent Howard seconded the motion. The motion carried on a vote of 5-0.

4. Process for handling 1995/1996 Grazing Leases on remand and discussion of Attorney General's opinion on implication of Supreme Court decision on Idaho Code § 58-310. – Presented by Bryce Taylor, Bureau Chief, Range Management/Surface Leasing and Nick Krema, Deputy Attorney General

Attorney General stated that this is not an Attorney General's opinion. This is a response to a request.

Mr. Krema provided copies of the correspondence to the Land Board. He stated he had been asked to provide the Land Board with some guidance as to the procedure that should be implemented by the Board in evaluating conflict grazing lease auctions in light of the Supreme Court's decision invalidating as unconstitutional Idaho Code Section § 58-310B.

In its opinion, the Supreme Court indicated to the Board and to the Department that Idaho Code Section § 58-310 should be used in evaluating conflict grazing lease applications. However, the court did not provide any guidance as to what form of Idaho Code Section § 58-310 should be used. The form of § 58-310 presently on the books or the form of § 58-310 that was on the books prior to the creation of Idaho Code Section § 58-310B.

Mr. Krema provided background information regarding Idaho Code Section 58-310B, which was a comprehensive scheme for dealing with conflict grazing lease applications. It also deleted provisions from § 58-310 that, prior to the enactment of § 58-310B, dealt with the issue of grazing leases.

One provision dealt with the use of grazing management contracts from a prior grazing leaseholder. The second deleted provision concerned two factors that could be taken into account by the Board in evaluation of a grazing lease conflict application. That was essentially the impact of the award on a current lessor and its total operation as well as the impact of the award of that lease on the total number of acres that the grazing operator had under his control.

In order to determine which of the two forms of this statute to implement, it is necessary to look at the rules of statutory construction. If a portion of a statute, or a statutory enactment, is struck down as unconstitutional, it is necessary to look at legislative intent to determine whether or not the remainder of the statute should be given effect or if that part that is not held unconstitutional is so integral to the total operation of the statute that it should not be given effect as well. In this case there was a situation where the legislature was taking provisions out of one code section and putting it into another code section that dealt globally with the subject of grazing leases.

Mr. Krema stated in the circumstance where the statutory provision dealing globally with grazing leases was struck down, he believed the legislative intent would not be to allow the statute that had previously dealt with grazing leases to stand without those provisions included. The effect of that would be where the unconstitutional provision is so integral to the legislative scheme then the whole statutory provision, in this case Senate Bill 1194, would fail. Under the rules of statutory construction that would resurrect the statute as it existed prior to the enactment of §58-310B and the deletion of those provisions of § 58-310.

The normal process would be to simply resurrect the prior statute. In light of the IWP decision, he felt the Board should look at the provisions that would be re-enacted. Those were twofold. (1) A provision that provided for continuation of a grazing management contract that a prior lessor had in effect. (2) To instruct the Land Board to look at the effect of the award of the lease on the total operation and the effect of the award of the lease on the total number of acres to be grazed.

Mr. Krema said, in his opinion, those provisions are so similar to the provisions of Idaho Code § 58-310B that were struck down by the Supreme Court as unconstitutional that it would be unadvisable for the Land Board to take those types of factors into account when determining whether or not a lease should be awarded in the conflict situation.

Mr. Krema believed the discretion vested in the Board in the factors that can be considered is quite broad. First, you have constitutional discretion as prudent land managers to obtain the maximum long-term return for the endowment and that discretion gives quite a bit of latitude, taking different types of issues and determining what can be considered in resolving a conflict. He said to also note that in all forms § 58-310 provides that the Land Board may reject any and all bids for any other reason, which in the judgment of such State Land Board justifies rejection of the bids. He felt it would be appropriate for the Land Board to set disclosure requirements and disclosure time limits to be evaluated in determining post-bid who the awards should be granted to.

Secretary of State Cenarrusa asked Mr. Krema if it was his thinking that the two provisions in § 58-310 before § 58-310B was passed were null and void. Mr. Krema said the two provisions that direct the Board to look at the effect of the award on the grazing operation and to look at the total number of acres to be grazed are so similar to the elements that were stricken, he felt they would be found unconstitutional.

Mr. Taylor said regarding the processing of the leases – the Department does not have a written memorandum at this time. If the Land Board wanted to wait until the July 13, 1999 meeting, he would provide a written memorandum to respond to. There was considerable discussion regarding the content of the memorandum.

Governor Kempthorne asked if there were any objections to providing the memorandum at the July 13, 1999 meeting. There were no objections and it was so ordered.

5. Camp Howard Ridge Land Exchange – Request for final approval to complete the Camp Howard Ridge Land Exchange between the state of Idaho and P and H Land Company, Inc. – Presented by Perry A. Whittaker, Chief, Bureau of Real Estate

Mr. Perry Whittaker provided background information. This item was before the Board for consideration at a prior meeting and was postponed to this meeting due to a Board request for further review.

One state parcel was removed from the exchange and the request is before the Board for final approval. Department staff recommends Land Board approval to complete the exchange.

Attorney General Lance moved that the Land Board accept the recommendation of the Department. Superintendent Howard seconded the motion. The motion carried on a vote of 5-0.

Attorney General Lance moved to enter into Executive Session. Secretary of State Cenarrusa seconded the motion. The motion carried on a vote of 5-0.

• EXECUTIVE SESSION

- 6. To consider and advise its legal representatives in the case of Idaho Watersheds Project, Inc. v. Land Board (Ingram case) – Idaho Code § 67-2345 (1)(f)
Presented by Stephanie Balzarini, Deputy Attorney General**
- 7. To consider and advise its legal representatives in the case of Treasure Valley Concrete, Inc. v. Land Board – Idaho Code § 67-2345 (1)(f)
Presented by Will Whelan, Deputy Attorney General**
- 8. To consider acquiring an interest in real property which is not owned by a public agency. Idaho Code § 67-2345 (1)(c)
Presented by Perry A. Whittaker, Chief, Bureau of Real Estate**

No decisions or motions were made during Executive Session.

Attorney General Lance moved to return to Regular Session. State Controller Williams seconded the motion. Motion carried on a vote of 5-0.

There being no further business to come before the Board, the meeting adjourned.

IDAHO STATE BOARD OF LAND COMMISSIONERS

/s/ Dirk Kempthorne
President, State Board of Land Commissioners and
Governor of the State of Idaho

/s/ Pete T. Cenarrusa
Pete T. Cenarrusa
Secretary of State

/s/ Stanley F. Hamilton
Stanley F. Hamilton
Director

<p>The above-listed final minutes were approved by the State Board of Land Commissioners at the September 14, 1999 regular Land Board meeting.</p>
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